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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PETE TAVITA SOLOMONA, Defendant and Appellant.	G031098 (Super. Ct. No. 99NF2840) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Gilbert J. Gaynor, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Andrew S. Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Pete Solomona shot and killed 17-year-old Brandon Ketsdever, who stole some Halloween decorations from the porch of defendant's home. In his first trial, a jury

found Solomona guilty of second degree murder, but the court granted his motion for a new trial. Mistrial ended the second proceeding, but in a third trial the jury found Solomona guilty of voluntary manslaughter and the court sentenced him to six years in prison. Solomona appeals his conviction on grounds of erroneous exclusion of evidence, instructional error, prejudicial display of grief by the victim's family, prosecutorial misconduct, and cumulative error. For the reasons discussed below, we affirm the judgment.

I

FACTS

On the evening of October 18, 1999, Brandon Ketsdever, Frank Nelson, and Tanner Hallihan were driving around Buena Park. The trio decided to steal Halloween decorations from several homes, including some trash bag pumpkins and a plastic pumpkin from Solomona's porch. Solomona heard a noise outside his front door, loaded a gun, and went outside to investigate. By that time, Ketsdever and his friends were gone. Solomona's 14-year-old neighbor informed him three boys in a white car took his decorations. Solomona searched the neighborhood for the culprits, and pulled up to his driveway some 15 minutes later. As Solomona waited in his car for his wife to move another vehicle, fate brought Ketsdever back to the scene.

Ketsdever and his friends had driven away from Solomona's home after stealing the decorations. One of Ketsdever's cohorts threw a newspaper or pamphlet at a passing vehicle. The driver, Clinton Kerbaugh, pursued them. The chase brought Ketsdever back to Solomona's neighborhood, where Kerbaugh used his vehicle to block Ketsdever's car at the end of the street. In the midst of the commotion, a neighbor told Solomona the boys who stole his decorations had returned.

While Kerbaugh and Ketsdever yelled at each other from within their vehicles, an angry Solomona hurried to Ketsdever's car. With his finger poised on the trigger, he pointed a gun mere inches from Ketsdever's head, cocking the hammer of the weapon. Testimony varies as to what Solomona said to Ketsdever,[1] but Solomona's gun discharged, killing Ketsdever.

A shocked Solomona began walking around in small circles. His wife, who was nearby, took the gun away from him and called 911. At trial, Solomona testified he hit the window post of Ketsdever's car with his gun hand to get the boy's attention, and the weapon accidentally discharged.

II

DISCUSSION

A. No Error in Excluding Hearsay Statement

During direct examination of Solomona's wife, the following colloquy occurred: "[Defense counsel]: What made you think he [Solomona] was in shock [after the shooting]? [¶] [Witness]: Well, I know my husband pretty well. And seeing the look on his face made me realize or know that he was not in the right state of mind . . . . [¶] . . . [¶] [Defense counsel]: Was he saying anything? [¶] [Prosecutor]: Your Honor, that would be hearsay. [¶] [Court]: Overruled. [¶] You can answer that "Yes" or "No." [¶] [Witness]: He did mumble something. [¶] [Defense counsel]: Okay. Don't tell us what he said. Just was he saying anything? [¶] [Witness]: I did hear him say something. [¶] [Defense counsel]: Could you make out what he was saying? [¶]

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[1] Solomona testified he asked, "Where is my stuff? I know you took my pumpkins." Nelson agreed he heard Solomona ask about his pumpkin. Hallihan heard, "Do you think I am messing around?" but Kerbaugh and his passenger testified Solomona asked, "Where's [*sic*] my Bunnies? I am not fucking around. I'll blow your fucking brains out."

[Prosecutor]: Same objection, your Honor. [¶] [Court]: Overruled. [¶] [Witness]: I believe he said it was an accident. [¶] [Prosecutor]: Your Honor, that would be hearsay. [¶] [Court]: Sustained. [¶] The answer is stricken. The jury is admonished to disregard it. It's nonresponsive."

Solomona complains the trial court erred in sustaining the prosecutor's objection to the statement the shooting was an "accident." This argument is meritless for several reasons. First, after instructing the witness to answer "Yes" or "No" to prevent inadvertent admission of hearsay, the court could properly conclude the witness's answer, "it was an accident," was nonresponsive. But the court, we are told, lacked the power to determine the statement was nonresponsive because the prosecutor objected only on hearsay grounds. In support of this claim, Solomona cites Evidence Code section 766: "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken *on motion of any party*." (Italics in Solomona's brief.)

This argument is wholly without merit. Hoary precedent explicitly holds the court need not "await the motion of the district attorney to have the irresponsive answers stricken out." (*People v. Dad* (1921) 51 Cal.App. 182, 185.) As that case explains, "It must be remembered that the counsel are officers of the court to assist the trial judge in conducting the proceedings regularly and expeditiously, but the responsibility of so conducting the trial rests ultimately upon the judge." (*Id.* at pp. 185-186; see Pen. Code, § 1044 ["It shall be the duty of the judge to control all proceedings during the trial"]; see also 31A Cal.Jur.3d (2003) Evidence § 675, p. 287 [court may "exclude, of its own motion, inadmissible evidence"]; *People v. Clark* (1992) 3 Cal.4th 41, 144 [trial court properly refused to allow witness to answer improper questions even though prosecutor did not object].)

The authority Solomona cites for the proposition that "relevant and material" evidence is admissible though nonresponsive is distinguishable. (See *Westman v. Clifton's Brookdale, Inc.* (1948) 89 Cal.App.2d 307.) There, a witness gave a nonresponsive answer and the trial court properly struck it. (*Id.* at pp. 311-312.) The court erred, however, by precluding counsel from rephrasing his question to elicit a responsive answer. In other words, the court's error was not in excluding the nonresponsive answer but in entirely forestalling a relevant line of inquiry. (*Id.* at pp. 312-314.) Here, in contrast, counsel made no effort to obtain a responsive answer with a direct question. Failure to do so was not the court's fault. In sum, the court did not abuse its discretion in striking the statement as nonresponsive.

Additionally, the court properly sustained the hearsay objection to the statement. "'Under Evidence Code sections 403 and 405, if a hearsay objection is properly made, the burden shifts to the party offering the hearsay to lay a proper foundation for its admissibility under an exception to the hearsay rule.'" (*People v. Livaditis* (1992) 2 Cal.4th 759, 778 (*Livaditis*).) Solomona made no attempt to suggest an applicable hearsay exception. On appeal, he acknowledges the statement is hearsay and now suggests it falls under the exception for spontaneous utterances. (Evid. Code, § 1240.) But this argument was never raised below. As such, the court never had a chance to consider whether the foundational requirements for the exception were met, and the prosecution was deprived of its chance to contest the spontaneity of the statement. (See *Livaditis*, *supra*, 2 Cal.4th at p. 780.) We therefore decline to reach the argument on appeal. (*Ibid.*)

Even if the statement were admissible under the spontaneous utterance exception, Solomona suffered no prejudice by its exclusion. Solomona testified the

shooting was an accident, and other witnesses supported his version. Defense counsel emphasized this point in closing argument, and an instruction from the court (CALJIC No. 4.45)[2] amply informed the jury of his defense. There are no grounds for reversal on this score. (Cal. Const. art. VI, § 13; Evid. Code, § 354.)

B. Any Error in Instruction on Self-Defense Was Harmless

Solomona next contends the trial court erred by in giving a sua sponte instruction on self-defense over his objection. The court gave CALJIC Numbers 5.10 (Resisting Attempt to Commit Felony); 5.12 (Justifiable Homicide in Self-Defense); 5.15 (Charge of Murder — Burden of Proof re: Justification or Excuse); 5.16 (Forcible and Atrocious Crime — Defined [i.e., any felony instilling "a reasonable fear of death or great bodily injury"]); 5.52 (Self-Defense — When Danger Ceases); and 5.55 (Plea of Self-Defense May Not Be Contrived). We agree the evidence did not warrant these instructions, but any error in giving them was harmless.

Self-defense requires an actual, reasonable belief in the need to defend against an imminent danger of death or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) As explained to the jury in CALJIC No. 5.12, "the person who does the killing" must "actually and reasonably believe[]: [¶] 1. That there is imminent danger that the other person will either kill [him] or cause [him] great bodily injury; and [¶] 2. That it is necessary under the circumstances for [him] to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to [himself]." But substantial evidence must support the trial

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[2] CALJIC No. 4.45, as given, provided: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [neither] [criminal intent] [nor] [[criminal] negligence,] [he] does not thereby commit a crime." (Brackets in original.)

court's instructions. "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

The Attorney General attempts to justify the instruction by focusing on sounds Solomona heard when his decorations were stolen. Solomona testified he thought someone was trying to open his security door and break into his house. And when he exited his vehicle and walked over to Ketsdever's car, he grabbed his gun "because I still had this fear in me they might have a weapon and, you know, they might jump me." The trouble with the Attorney General's position is that none of this supports the notion Solomona pulled the trigger in self-defense. Indeed, he insisted the incident was an accident.

True, the confrontation between Ketsdever and Solomona may have been heated, but there was simply no evidence from which a jury could find Solomona actually killed Ketsdever to protect himself from an imminent threat of great bodily harm or death. Seated in his vehicle, Ketsdever posed no apparent threat to Solomona. Conceivably, imperfect self defense might arise in such circumstances, but the Attorney General's attempt to salvage the instructions on this ground fails because the court struck the "unreasonable belief in the necessity to defend oneself . . ." language from the voluntary manslaughter instruction. (See CALJIC No. 8.40.)

Nevertheless, any error in instructing on self-defense was harmless. (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*); see *People v. Breverman* (1998) 19 Cal.4th 142, 149, 164-179 [*Watson* harmless error standard used to evaluate instructional violations that do not constitute structural defects in trial].) Applying this standard, we

assess whether there was any reasonable probability Solomona would have obtained a more favorable outcome had the error not occurred. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

Solomona concedes the jury, "once it worked through the thorough instructions on self-defense . . . ," likely "determined that the theory of self-defense was not applicable," and hence, "disregarded it[.]" (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [instruction on an unsupported theory prejudicial only if that theory was sole basis for guilty verdict]; *People v. Hairgrove* (1971) 18 Cal.App.3d 606, 609 ["Because the erroneous instructions were so clearly inapplicable, we are convinced the jury disregarded them in reaching its verdict"].) From this, Solomona inexplicably concludes the jury then "disregard[ed] the fact-based defense of accident arising from lawful conduct *because* Mr. Solomona's conduct did not rise to the level of self-defense." (Italics added.)

This argument is a non sequitur. Rejecting the self-defense theory did not compel the jury to reject Solomona's claim he accidentally shot Ketsdever. The two theories were logically distinct, capable of independent assessment; rejection of one theory did not in any way implicate the other. Based on the evidence, the jury could reasonably conclude that, even if Solomona did not intentionally pull the trigger in self-defense, the incident was not purely an accident warranting acquittal. A third alternative existed. The court instructed the jury on the elements of voluntary manslaughter, as follows: "Every person who unlawfully kills another human being without malice aforethought but in conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192[, subdivision] (a)." (See CALJIC No. 8.40.) By its verdict, the jury determined acquittal was not appropriate because

Solomona's deadly gun-banging constituted a conscious disregard for life — in other words, voluntary manslaughter and not self-defense or pure accident.

The jurors were also instructed: "Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist." (See CALJIC No. 17.31.) We must presume the jury followed this instruction and faithfully evaluated each of the legal theories presented. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17; *People v. Isby* (1947) 30 Cal.2d 879, 896-897.) The jury heard and rejected Solomona's accident defense. As discussed, the self-defense and accident theories were wholly distinct and in no way dependent on each other. Thus, it is not reasonably probable the jury would have acquitted Solomona if the self-defense instructions had not been given. Consequently, Solomona's argument for reversal is without merit.

C. Expressions of Grief by Ketsdever's Mother Are Not Reversible Error

Appellant contends two episodes in which the jurors observed Ketsdever's mother crying in the hallway outside the courtroom require reversal. There is no merit to this argument. To be sure, "[m]isconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022 (*Lucero*).) But Solomona cites no authority that crying by a victim's mother constitutes misconduct per se, and we have found none to this effect. The court admonished the jury to disregard these incidents, and inquired whether defense counsel wanted to pursue the issue. Counsel declined and the argument is therefore waived on appeal.

Even if we were to reach the merits of the argument, it fails. The court admonished the jury as follows: "[I]f there is something that you could interpret as

bearing on the case, that might play to your sympathy or emotion, I would caution you to disregard it. [¶] It's not what occurs in a hallway or in a parking lot, but rather the evidence that you hear here in court, and then applying the law that I will give to you this afternoon to the case." We must presume the jury heeded this admonition. (*People v. Walsh* (1993) 6 Cal.4th 215, 263.) Appellant seizes on the court's use of "I *would* caution you to disregard it" (italics added) instead of more emphatic language, but the effect was the same. The court further instructed the jury, "You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (see CALJIC No. 1.00), and we presume the jury followed this instruction. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) Any potential prejudice to defendant was cured by the court's admonition and instruction. (See *Lucero*, *supra*, 44 Cal.3d at p. 1024.)

D. Prosecutorial Misconduct Does Not Require Retrial

Appellant next casts himself as the victim of prosecutorial misconduct, claiming repeated improper questioning requires reversal. It does not. Most of the improper questions, several of which we discuss below, were argumentative. The trial court's observation, after sustaining yet another objection on this ground, is illuminating. The court concluded, in a hearing outside the presence of the jury, ". . . I don't think you are doing it intentionally. I just don't think you understand the nature of an argumentative question."

The prosecutor's intention, however, is not dispositive. "Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 836.) As observed by our Supreme Court, "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to

the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

Whether considered under the rubric of misconduct or error, the applicable federal and state standards are well established. "'"'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"' [Citation.]'" (*Hill*, *supra*, 17 Cal.4th at p. 819.) "[I]n the absence of prejudice to the fairness of a trial, prosecutor[ial] misconduct will not trigger reversal." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) The prosecutor's conduct here does not require reversal.

Two incidents stand out. First, the prosecutor seemed not to understand that the emotional trauma a witness suffered as a result of the shooting was irrelevant to the jury's determination of guilt. (*People v. Arias* (1996) 13 Cal.4th 92, 160.) During direct examination of Kerbaugh's wife, the following exchange occurred: "[Prosecutor]: Are you on any type of medication today? [¶] [Witness]: Yes, I am. [¶] [Prosecutor]: Were you on that medication before you saw what happened in the intersection on October 18th? [¶] [Defense counsel]: Objection, irrelevant and immaterial. May we have a 402 on it? [¶] [Court]: Sustained. [¶] [Prosecutor]: Aside from being afraid of the defendant, did what you see in the intersection that night have any long-term [e]ffect on you? [¶] [Defense counsel]: Objection, irrelevant, immaterial. And maybe we

should have a — [¶] [Court]: Sustained." The court then conducted a hearing outside the jury's presence, and the prosecutor did not pursue this improper line of questioning any further.

The second incident occurred during the prosecutor's closing argument. She urged the jury to infer from the defendant's failure to call his employer and neighbor that they held negative opinions of him. The court sustained Solomona's objection. Similar arguments have long been recognized as patently unfair. In *People v. Harris* (1926) 80 Cal.App. 328, the court explained: "If counsel could properly argue that the [defendant's employer and supervisors] had not been called, why might he not with perfect propriety secure a list of all of the acquaintances of the defendant and so argue as to each and every one of them?" (*Id.* at p. 334.) The prosecutor's attempt to manufacture negative character evidence was clearly improper.[3]

But these incidents did not deprive Solomona of a fair trial. Even under the *Chapman v. California* (1967) 386 U.S. 18 standard for harmless error, the prosecutor's actions were harmless beyond a reasonable doubt. Simply put, the evidence Solomona acted in conscious disregard for human life was overwhelming. When Ketsdever

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[3] The prosecutor's difficulty in adhering to the rules of evidence repeatedly tested the court's patience. The following colloquy regarding the prosecutor's attempt to impeach a defense witness is an example. "[Court]: All right. The record will reflect the jury's left the courtroom. [¶] And I would assume that there had been some discussion between counsel that you were going to go into this area regarding this theft incident involving the witness. Is that correct? [¶] [Prosecutor]: No, it's not correct, your Honor. And I have to say, I don't know why you would make that assumption." After excusing the witness, the court patiently explained: "I made the assumption because I had numerous pretrial motions regarding admissibility of [prior offenses for impeachment purposes] as to other witnesses. And since I didn't get any objection, I made that assumption . . . ." Even marginally experienced trial attorneys understand the obligation to advise counsel and the court beforehand of the prosecutor's intention to impeach a witness, especially if the matter has been the topic of pretrial motions.

improvidently returned to the neighborhood, Solomona hurried angrily over to the car and, with his finger on the trigger, pointed a gun at Ketsdever's head from inches away, cocked the hammer of the gun, and banged his gun-wielding hand on the car's window post. We are confident beyond a reasonable doubt the prosecutor's miscues had no influence on the jury's conclusion Solomona acted in conscious disregard for human life.

Solomona's remaining complaints of prosecutorial misconduct are without merit. At oral argument, appellate counsel emphasized six argumentative comments in the prosecutor's opening statement. But trial counsel failed to request an admonition and fails to explain why an admonition at this early stage in the trial would have been futile. (*People v. Carter* (2003) 30 Cal.4th 1166, 1207 [request that trial court admonish jury to disregard misconduct necessary to preserve claim for review]; *People v. Wharton* (1991) 53 Cal.3d 522, 591 [failure to object to curable misconduct waives the error].)

Solomona also cites as evidence of misconduct the 93 objections his attorney was forced to make during the prosecutor's cross-examination. But as Solomona acknowledges, the court sustained virtually all these objections. Our review discloses the vast majority were sustained on elementary grounds of "Argumentative" and "Asked and answered." Apart from the witness-impact incident discussed above, none of the questions or statements revealed improper evidence or evidence previously excluded by the court. In these circumstances, we note any harm to Solomona was de minimis, given that the jurors were instructed they should not guess the answer to any question, assume true any insinuation in a question, or accept as evidence the statements of counsel. (See CALJIC No. 1.02; *People v. Sanchez* (1995) 12 Cal.4th 1, 70 [presuming "jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"].)

Indeed, the spectacle of seeing the hapless prosecutor squashed by objections the court consistently sustained seems likely to have reflected more poorly on the prosecutor than the defendant. In any event, as we have discussed, the prosecutor's missteps were harmless beyond a reasonable doubt.[4]

E. The Cumulative Error Doctrine Does Not Apply

Solomona contends the alleged errors we have discussed constitute cumulative error. The two errors we have found were unrelated to each other and had no cumulative effect. (Compare *Hill*, *supra*, 17 Cal.4th at p. 847 [noting "negative synergistic effect" of errors there resulted in a degree of prejudice "more than that flowing from the sum of individual errors"].) Solomona himself conceded the jury likely disregarded the unwarranted self-defense instructions and, as such, we do not perceive any untoward synergistic effect with the prosecutor's improper questions, which the court also instructed the jury to ignore. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 ["litmus test" of cumulative error analysis "is whether defendant received due process and a fair trial"].) No cumulative error requiring reversal occurred.

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[4] We commend the trial court for its close and patient supervision of these proceedings. From the beginning, the court strictly monitored the prosecutor, noting "in relation to the first trial, some concerns the court had regarding the professionalism of counsel in relation to this matter." When those concerns did not abate, the court took the extra step, after sustaining a defense objection during Solomona's cross-examination, to excuse the jury and warn the prosecutor it had "reviewed, line by line, transcripts from the first trial and the second trial," finding them "replete on cross-examination with argumentative questions from yourself to this witness." As discussed, the trial court intervened several times to admonish the prosecutor when she strayed too far from the rules of evidence or the court's pretrial rulings. At one point the court issued a contempt warning, commenting, "I don't think these families should be put through another trial because of your conduct." In sum, the court kept the prosecution on a short leash, and the court's diligent efforts to prevent prejudicial misconduct may well have prevented reversal of the judgment.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.